Supreme Court, U.S.
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No. 96-2035

In The

Supreme Court of the United States

October Term, 1996

VARSALONA'S ITALIAN RESTAURANT d/b/a BOOMER'S and PATRICK VARSALONA,

Petitioners,

vs.

THE CITY OF MARIETTA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD, FRANK T. AYERS, PHILLIP GOLDSTEIN and ANSLEY L. MEADERS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF MARIETTA

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LIST OF INTERESTED PARTIES

The Petitioners are Varsalona's Italian Restaurant d/b/a Boomer's and Patrick Varsalona as listed in the caption.

The Respondents are correctly identified in the caption with the exception of Phillip Goldstein which is misspelled. The correct spelling is "Philip". The Respondent City of Marietta has no parent or subsidiary companies. The City of Marietta is a political subdivision of the State of Georgia.

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The Respondents, City of Marietta *et al.*, hereby oppose the petition of Petitioners, Varsalona's Italian Restaurant d/b/a Boomer's and Patrick Varsalona for a writ of certiorari to review the decision of the Georgia Supreme Court decided March 17, 1997, and request that the Court deny the petition for the reasons set forth below. The Georgia Supreme Court opinion is reported as *Goldrush II, Inc. v. City of Marietta*, 267 Ga. 683, 482 S.E. 2d 347 (Ga. 1997), *reconsideration denied*, April 3, 1997, *petition for cert. filed*, (U.S. June 26, 1997) (No. 96-2035). For the convenience of the Court, all citations to the opinion of the Georgia Supreme Court will be to the opinion attached as Appendix 1-32 of the petition.

The opinion of the Cobb County Superior Court filed April 2, 1996 is unreported and all references to that opinion will be to the opinion attached as Appendix 33-62 of the petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction over questions I and II presented by Petitioners pursuant to 28 U.S.C. § 1257(a). Notwithstanding, Respondents incorporate their jurisdictional objections regarding any questions over the procedures at the public hearing of January 19, 1995. *See* page 18 of Opposition Brief to petition of Mukesh Shretta *et al.* objecting to jurisdiction over question III.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

This petition represents the second petition for writ of certiorari from consolidated appeals before the Georgia Supreme Court.[1] Respondents reference and incorporate as if fully set

1. Initially, three adult entertainment clubs filed suit against (Cont'd)

forth herein, their Brief in Opposition to the petition of Mukesh Shretta *et al.* The factual and procedural background of this case is summarized in Respondents' first Opposition Brief and more fully set forth in the Georgia Supreme Court opinion attached to the petition as Appendix 1-32. Further, the arguments advanced by these Petitioners are substantially similar to those already advanced by Petitioners, Mukesh Shretta *et al.* in their petition.

B. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, Respondents also bring the following misstatements of facts contained in the petition to the Court's attention:

Petitioners mislead this Court by continually stating that there were two dissents to the Georgia Supreme Court opinion. The Georgia Supreme Court affirmed the grant of summary judgment to Respondents by the trial court with Justice Sears being the lone dissenter. Petitioners filed a Motion for Reconsideration which the Georgia Supreme Court denied. Justice Sears and Justice Carley dissented to the denial of the Motion for Reconsideration. Justice Carley's dissent, however, cannot be construed as a separate dissent or as a joinder in Justice Sears' dissent. Justice Carley simply dissented from the denial of the Motion for Reconsideration, but gave no reasons for his dissent.

(Cont'd)
Respondents challenging the amendment to the City's ordinance, and the cases were consolidated in the Superior Court of Cobb County. The cases were then decided in consolidated appeals before the Georgia Supreme Court. Petitioners Mukesh Shretta *et al.* filed their petition on June 12, 1997 and Respondents filed their Opposition Brief on July 14, 1997. In the interim, Petitioners *Varsalona's Italian Restaurant et al.* filed their petition on June 26, 1997. The third adult entertainment club, Cyprus Lounge, did not file a petition.

Petitioners also make the same mistake made by Petitioners Mukesh Shretta and Gold Rush II, d/b/a Club Taj Mahal in their petition by failing to attach a correct copy of the ordinance passed by the City of Marietta and at issue in this case. The differences between the ordinance set forth in the petition and the correct ordinance as passed by the Marietta City Council are set forth in Respondents' Opposition Brief to the petition of Mukesh Shretta *et al.* Respondents include the correct copy of the ordinance in its Opposition Brief. *See* Appendix A.

REASONS FOR DENYING THE WRIT

This case is the latest entry in Georgia's free expression jurisprudence in the context of nude dancing which began with the landmark case of *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982). The Cobb County Superior Court and the Georgia Supreme Court both devoted substantial time and resources to reviewing the issues in this petition, and correctly determined that the City's adult entertainment ordinance was constitutional. As the petition raises no new issues for this Court's review, the petition should be denied.

I.

THE GEORGIA SUPREME COURT PROPERLY CONCLUDED THAT THE ORDINANCE AT ISSUE WAS "CONTENT-NEUTRAL" AND THAT THE RESPONDENTS MET THEIR BURDEN OF PROOF IN SHOWING THAT THE PREDOMINATE PURPOSE BEHIND THE ORDINANCE'S ENACTMENT WAS TO PREVENT PERNICIOUS SECONDARY EFFECTS ASSOCIATED WITH ADULT ENTERTAINMENT ESTABLISHMENTS.

Petitioners initially argue that review is warranted because this Court has not addressed a case involving nude dancing and

the First Amendment since *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Petitioners also claim that certiorari should be granted because there was no majority opinion in *Barnes* and therefore, the decisions of the lower courts have been inconsistent. All such claims are without merit.

It is undisputed that the *Barnes'* decision yielded no majority opinion[2], and that the decision has sparked much academic debate over the concurring and dissenting opinions of the nine Justices, but it is simply untrue that the decisions of the lower federal and state courts concerning regulation of nude dancing have been inconsistent since *Barnes*. There is no authority to support Petitioners' arguments, and Petitioners cite none. Petitioners also fail to delineate the alleged inconsistencies. That is because the established precedent set by this Court in the landmark case of *City of Renton v. Playtime Theaters, Inc.*, 457 U.S. 41 (1985) has been consistently followed by the federal and state courts,[3] and this Court's opinion in *Barnes* did not in any way alter the majority opinion in *Renton* that:

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2. It was clear, however, that the majority of Justices agreed that nude dancing is considered "expressive conduct" within the outer perimeters of the First Amendment. *Barnes*, 501 U.S. 560 (1991) (plurality opinion). However, that is not to say that such expressive conduct may not be restricted or regulated in any way. *Chambers d/b/a "Neon Cowboy" v. Peach County*, 467 S.E. 2d 519, 521 (Ga. 1996).

3. *See ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 578, 130 L. Ed. 2d 493 (1994); *City of Ramsey v. Holmberg*, 548 N.W. 2d 302 (Minn. App. 1996), *cert. denied*, __U.S __ (1997); *Mitchell v. Com'rs of Com'n on Adult Ent. Est.*, 802 F. Supp. 1112 (D. Del. 1992), 10 F.3d 123, 133 (3rd Cir. 1993); *Dudley's Food & Spirits v. College Park*, 265 Ga. 618, 458 S.E. 2d 823 (1995); *Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 457 S.E. 2d 816 (1995). It is clear that the federal and state courts have consistently held that under *City of Renton*, a city may rely on the experience of, and studies produced by, other cities regarding the adverse secondary effects linked with adult businesses in passing ordinances to address such problems. *Renton*, 457 U.S. at 51.

> The First Amendment does not require a city, before enacting an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

457 U.S. at 51.

In fact, Justice Souter's concurring opinion in *Barnes* expressly rejects a requirement of local affirmative evidence of secondary effects and reinforces the conclusion of this Court that a city is not required to litigate the issue of secondary effects in every case. *See Barnes* at 584-85. A city is simply required to prove that it considered specific evidence of pernicious secondary effects and that the city reasonably believed such evidence to be relevant to the problems addressed by the City. *Renton* at 51.

Petitioners' allegations that Respondents were required to go beyond the requirements established in *Renton* and reaffirmed in *Barnes* are unsupported by current authority, and Petitioners present no compelling reason for this Court to alter this well-established precedent.

In this case, an incident which occurred after enactment of the ordinance illustrates that Respondents were justified in relying on the studies of other communities which detail the pernicious secondary effects of alcohol and adult entertainment. On July 19, 1996, a patron entered the Cyprus Lounge, one of the adult entertainment clubs in the city limits[4], and consumed

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4. Cyprus Lounge was an appellant in the consolidated appeals before the Georgia Supreme Court but did not file a petition for certiorari.

alcoholic beverages for many hours while viewing nude dancing. The intoxicated patron left the Cyprus Lounge and was involved in a collision with another vehicle in which the driver was seriously injured and the driver's wife was killed. The patron entered a guilty plea to the charges[5] and is currently serving his sentence.

Petitioners further allege that the real purpose behind the ordinance was to censor and suppress free expression. Such allegations ignore the abundant evidence in the record, and the practical applicability of the ordinance. Petitioners chide the trial court for granting summary judgment claiming that "contrary evidence" existed. Petitioners also state that there was abundant evidence *in the record* that the true purpose was censorship. However, this alleged "evidence" is never set forth in the petition. That is because it does not exist. Rather, Petitioners write generally about the constitutional principles of the First and Fourteenth Amendment, and the disservice to the legal system. It is apparent that Petitioners hope their trumped up allegations along with reference to the "pillars" of the Constitution will catch this Court's attention without the benefit of supporting authority. That is simply not enough. The record speaks for itself and illustrates that both the trial court and the Georgia Supreme Court had ample evidence to support the grant of summary judgment to Respondents.

The evidence showed that the Respondents did not rely solely on its preamble as to the purpose of the ordinance.[6] Although the Georgia Supreme Court does reference the preamble to the ordinance, as correctly pointed out by

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5. *See* footnote 14 of Respondents' Opposition Brief to petition of Mukesh Shretta *et al.*

6. *See* Opinion of Cobb County Superior Court, Appendix at 48; Opinion of Georgia Supreme Court, Appendix at 15.

Petitioners, the court has recognized that reliance on the verbiage in an ordinance's preamble is not enough. *See Chambers d/b/a "Neon Cowboy" v. Peach County*, 467 S.E. 2d 519, 521 (1996); *Discotheque v. City Council of Augusta*, 264 Ga. 623, 449 S.E. 2d 608 (1994). In both those cases, the Georgia Supreme Court rejected as insufficient the cities' reliance on the preamble alone to support the constitutionality of an ordinance regulating adult entertainment. The Georgia Supreme Court specifically recognized that the facts of this case differed from those in *Chambers* and *Discotheque* in that the Respondents did not rely solely on the statement in its preamble as to the purpose of the ordinance. Rather, Respondents affirmatively proved that they considered *specific* evidence of the pernicious secondary effects of adult entertainment establishments.

Prior to adoption of the ordinance at issue, Respondents held a public hearing lasting approximately four (4) hours and the transcript detailing the evidence considered by Respondents is one hundred and seventy four (174) pages in length. The Respondents were supplied with ten (10) studies from other communities consisting of five hundred and six (506) pages detailing the pernicious secondary effects of the sale of alcohol in adult entertainment establishments, and a 1991 Atlanta Business Chronicle article on the adult entertainment business in Atlanta, Georgia. Eighteen (18) persons, including four lawyers representing the adult entertainment clubs, testified before the Marietta City Council regarding the amendment to the City's ordinance. The owner of a "juice bar" also testified that the presentation of nude dancing without alcohol was an economically viable venture. An expert real estate appraiser testified that the property values surrounding the adult entertainment establishments had declined. The Chief of Police testified at length regarding the issue of crime in addition to presenting his report. After consideration of all testimony and evidence, Respondents voted six to one to amend its ordinance.

The Georgia Supreme Court specifically considered and rejected Petitioners' allegations that an improper motive motivated the enactment of the ordinance finding that there was insufficient evidence as a matter of law[7], and relying on the precedent of this Court that it is improper to further inquire into judicial motives. In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court concluded that:

> judicial inquiry into legislative motives or purposes is a "hazardous matter" for what motivates one legislator to make a comment about a law is not necessarily what motives fellow legislators to enact the law.

Id. at 383.

Recognizing this important principle, this Court concluded in *Renton* that if it is established that the "predominate intent" of the enacted ordinance was to combat or avoid pernicious secondary effects, then the legislation is deemed to be content-neutral. *Id.* at 48. With these standards in mind, the Georgia Supreme Court properly concluded that Respondents met their burden of proving that the predominate goal in enacting the ordinance was to combat the pernicious secondary effects associated with adult entertainment establishments and therefore, the ordinance was content-neutral.

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7. Petitioners contend in their petition that the Georgia courts ignored all evidence of alleged "censorship". Petitioners do not state what "evidence" they are referring to, but Respondents assume they are referring to the newspaper quotes of the Mayor and several council members. The Georgia courts did not ignore this evidence but in fact specifically reviewed this evidence and concluded that it was insufficient as a matter of law to prove improper motive, and did not override the overwhelming evidence in the record that the "predominate" purpose behind the ordinance was the prevention of the pernicious secondary effects associated with adult entertainment establishments. *See* Appendix 14-16.

The Georgia Supreme Court also considered the affirmative evidence which disputed the allegations of censorship. The affidavits of six council members and the Mayor were submitted into evidence in which each member testified under oath that they considered the numerous studies presented to them prior to enactment of the ordinance and that they reasonably believed such evidence to be relevant to the problems addressed by the city. Further, each member testified that their personal feelings did not enter into their legislative decision.

After consideration of all the testimony and evidence, the Respondents voted six to one to enact the ordinance at issue. *See* Appendix A of Respondents' Brief in Opposition to the Petition of Mukesh Shretta *et al.* Looking at the text of the ordinance at issue, it is clear that the ordinance is not directed at speech or expression but at a type of conduct. The ordinance does not prohibit or restrict nude dancing in any way, but simply prohibits the consumption of alcohol to occur simultaneously with adult entertainment. *See Ranch House, Inc. v. City of Anniston*, 678 So. 2d 745 (Ala. 1996).[8] Accordingly, despite Petitioners claims to the contrary, the Petitioners are free to continue the operation of their business as adult entertainment establishments, but without the consumption of alcohol by their patrons. *See* Appendix at 56. The ordinance does not eliminate or prohibit nude dancing.[9]

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8. In *Ranch House*, the Alabama Supreme Court upheld an ordinance almost identical to Respondents finding that the ordinance was a valid exercise of the state's police powers. In a concurring opinion, Justice Cook observed that this type of ordinance only restricts the activities of the spectators and not the dancers' freedom of expression. *Id.* at 747.

9. As long as there is a "full opportunity for expression in all its varied forms to convey a desired message and that there [is] full opportunity for everyone to receive the message", then the free speech guarantees of the First

(Cont'd)

In analyzing the case, the Georgia Supreme Court recognized Petitioners' First Amendment rights and applied Georgia's traditional First Amendment analysis set forth in the landmark case of *Paramount Pictures v. Busbee*, 250 Ga. 252, S.E. 2d 250 (1982).[10] This three-prong analysis provides the basis for determining the constitutionality of an ordinance regulating adult entertainment, and states that an ordinance will be upheld if: (1) it furthers an important government interest; (2) the government interest is unrelated to the suppression of speech; and (3) if the incidental restriction on speech is no greater than is essential to the furtherance of that government interest. *Paramount* at 256. The Georgia courts properly applied the *Paramount* test to the facts of this case and concluded that the City's interest in reducing crime and preventing the deterioration of neighborhoods were important government interests; such

(Cont'd)

Amendment are satisfied. *See North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996), *cert. den.*, __ U.S. __ (1997) *citing Young v. American Mini Threatres*, 427 U.S. 50, 76 (J. Powell, concurring). In *North Avenue Novelties*, the Seventh Circuit upheld an ordinance regulating adult uses finding that the ordinance offered reasonable opportunity to disseminate speech and therefore, complied with the First Amendment. Specifically, the Seventh Circuit concluded that the ordinance did not prohibit sexually explicit expression, but merely required that such expression take place in specified areas and in a non-concentrated manner. Such restrictions were found to be content-neutral, served a legitimate government interest, and did not unreasonably limit alternative avenues of communication. *Id.* at 444. The same is true in this case: the ordinance at issue does not prohibit adult entertainment but merely requires that such entertainment not be combined with the sale or consumption of alcohol at the same location. The Georgia Supreme Court properly concluded that the ordinance was content-neutral and met the three prong test of *Paramount Pictures*. *See* Appendix at 16-18.

10. As set forth in Respondents' Opposition Brief to the petition of Mukesh Shretta *et al.*, Georgia's free expression analysis is derived from the framework established by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). *See* footnote 2 of first Opposition Brief.

interests were unrelated to the suppression of speech; and that the ordinance's application was sufficiently narrow to achieve such interests.[11] Therefore, the enactment of the ordinance was a proper exercise of the City's police powers.

It is clear that the Georgia courts have not "rubberstamp[ed] restrictive legislation . . . " as alleged by Petitioners, but carefully considered the evidence in the record and applied Georgia's well-established First Amendment analysis as derived from this Court's framework in *O'Brien* and adopted by the Georgia courts in *Paramount Pictures*. The ordinance in this case met all three prongs of the test. Although Petitioners may disagree with the result, the Georgia courts properly determined that the ordinance was constitutional. The Georgia courts adhered truthfully and with great candor to the long-standing principles which serve as pillars to the U.S. Constitution, and preserved the First Amendment rights of Petitioners. The ordinance in this case does not ban expression or "unpopular speech". Nor does it restrict nude dancing. Rather, the ordinance prohibits the consumption of alcohol on the premises of an adult entertainment establishment.

Petitioners' speculation that the approach allegedly adopted by the Georgia courts in accepting the pronouncement of the government itself might be read as a basis for banning hostile political speech is unfounded. In fact, Petitioners miss the mark. The Georgia courts did not rely solely on the City's assertion that a legitimate purpose lay behind the enactment of the ordinance. Nor did the courts rely on the stated purpose in the preamble. The trial court held an extensive hearing and received evidence as to the purpose of the ordinance. The court then

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11. It is interesting to note that Petitioners fail to ever reference the *Paramount Pictures* test in their petition. Nor do Petitioners attack the holding of the Georgia Supreme Court which finds that the Respondents met all three prongs of the test.

applied the three-prong *Paramount* test set forth above, and concluded that the ordinance was constitutional.

Petitioners' citation to *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985) as inconsistent with the Georgia Supreme Court's opinion is unavailing. In *Krueger*, the Eleventh Circuit held an ordinance regulating topless dancing unconstitutional and rejected the city's argument that the language in the preamble was evidence that its purposes in enacting the ordinance were proper. The city claimed that the language set forth in the preamble should end the court's inquiry into the purpose behind enactment of the ordinance given the restricted nature of the court's review. *Id.* at 855. The Eleventh Circuit then reviewed the evidence in the record and concluded that the evidence established that the purpose of the ordinance was censorship of the communication rather than legitimate government interests.

The Georgia Supreme Court was well aware of the *Krueger* decision as it had been referenced in the record, and the facts of this case are distinguishable. Here, the City did not argue that the language of its preamble was sufficient to support its purposes. Further, the city did not rely on post-hoc justifications, but supported its claims with evidence the City considered *prior* to enactment of the ordinance. In this case, the City considered specific studies detailing the secondary effects associated with adult entertainment establishments. In *Krueger*, there is no reference to any studies considered by the municipality prior to enactment of the ordinance. The City heard testimony from numerous witnesses which testified regarding the issue of crime and decreased property values which was absent from the record in *Krueger*. Furthermore, the Eleventh Circuit found that the evidence in *Krueger* conclusively established that improper motives motivated the legislation where the Georgia Supreme Court found that the evidence in this case was insufficient as a

matter of law to establish improper motive. Given these factual differences, the results of this case and *Krueger* were different but the principles applied by both courts were the same.

Similarly, Petitioners cite the case of *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997) (en banc). This case is also distinguishable on the facts of the case. In *Phillips*, the ordinance was struck down as unconstitutional on the basis of a "bare" record where there was no evidence that the municipality had considered specific evidence of secondary effects associated with adult entertainment establishments. *Id.* at 173-174. Here, it is undisputed that the City considered specific evidence of secondary effects prior to enactment of the ordinance, and therefore, Respondents' ordinance was found to be constitutional.

Respondents submit that the Georgia courts properly applied traditional First and Fourteenth Amendment principles to the facts of this case, and that the "majesty" of such principles has been preserved. The evidence of this case simply dictated a result different from that hoped for by Petitioners.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT IMPLICATED IN THIS CASE AS THERE IS NO VESTED PROPERTY RIGHT IN THE RENEWAL OF A LICENSE WHICH EXPIRES ON AN ANNUAL BASIS.

Petitioners argue in question II that their licenses would have been renewed but for the amendment to the City's ordinance. Such arguments are not only speculative but irrelevant. The issue at the heart of this case is whether Petitioners' possessed a vested right to the renewal of their

alcohol and adult entertainment licenses despite the change in the law which prohibited the issuance of an alcohol and adult entertainment license for the same property.[12]

The constitutional principles underlying the answer to this question were established by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972): "To have a property interest . . . a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Property rights are not created by the Due Process Clause of the U.S. Constitution, but instead arise by virtue of state law. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2704, 2077, 48 L. Ed. 2d 684 (1976). Once the property right becomes vested under state law, then the Due Process Clause controls the government's right to take it away. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Therefore, for the renewal of a license to fall under the protective umbrella of the Fourteenth Amendment, it must be deemed a "property interest".

The determination of what constitutes a "property interest" is made by looking at the statute or rule at issue. In this case, the City of Marietta code and Georgia statute regarding liquor and adult entertainment licenses govern.[13] Both the City code and the state statute expressly provide that liquor licenses expire at the end of each year and that a licensee must apply annually for each license. Similarly, the City code provides that an adult

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12. The ordinance in this case was adopted by Respondents following ratification by the voters of an amendment to the Georgia Constitution on November 8, 1994 which delegated the State of Georgia's authority under the Twenty-First Amendment to the U.S. Constitution to counties and municipalities. *See* Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia.

13. *See* Marietta City Code § 8-2-2-200(A); O.C.G.A. § 3-2-7.

entertainment license expires on an annual basis.[14] In order to be entitled to renewal, the applicant must meet annually the requirements set forth in the City code.[15]

In this case, the City, through the legislative process, altered the conditions for obtaining a license beginning on January 1, 1996.[16] The ordinance prohibited the holder of an adult entertainment license from serving, selling, distributing or suffering the consumption or possession of any intoxicating liquor, beer or wine or controlled substance upon the premises of any such licensee. The practical effect was to require the adult entertainment establishments to choose between either keeping their liquor license or keeping their adult entertainment license for the same premises after December 31, 1995 when their current licenses expired.[17] Under the amended ordinance, the Petitioners were not qualified to hold both licenses.[18] Therefore,

14. *See* Marietta City Code § 8-20-170.

15. *See* Marietta City Code § 8-8-2-130(A)(10); 8-20-170.

16. In December of 1995, all parties entered into a Consent Order whereby Petitioners could continue to serve alcohol and provide adult entertainment pending resolution of any appeals to the Georgia Supreme Court. After the Georgia Supreme Court issued its decision in March 1997, Petitioners applied for a Stay of Remittitur which was granted by the Georgia Supreme Court.

17. The Petitioners' 1995 liquor and adult entertainment licenses which were in effect at the time the ordinance was passed were not affected by passage of the ordinance. In other words, the Petitioners' 1995 licenses were not suspended or revoked in any manner. Rather, Petitioners were allowed to operate under their current licenses until expiration of such licenses at the end of the year. At that time, they were required by City code and state law to renew the licenses. *See* Appendix B – Copy of Boomer's beer/wine license which states on the face of the license that it expired on December 31, 1995.

18. The prohibition against simultaneously holding a liquor license and (Cont'd)

based on these provisions, the Georgia Supreme Court concluded that Petitioners did not have a vested right in the renewal of their licenses. The Court contrasted this result with state statutes where licenses are issued for an indefinite duration rather than on an annual basis. *See Cabo Distrib. Co. v. Brady*, 821 F. Supp. 582, 597 (N.D. Cal. 1992).

As Petitioners' licenses expired on an annual basis, they did not have a vested right in the law never changing. The Petitioners were aware of this annual renewal and there were no assurances that the licensing requirements would not change in the future. In *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6 (Colo. 1993), the Colorado Supreme Court held that a licensee who relies upon the requirements never changing does so at his own peril. *Id.* at 19. The expenditure of substantial sums by Petitioners in reliance upon the renewal of their licenses and with the expectation that the law would never change does not create a "vested property right" subject to protection of the Fourteenth Amendment. Rather, such amounts to a unilateral expectation of renewal which is simply not enough under the principles set forth in *Roth*.

Petitioners reference to the dissent of Justice Sears, which was not joined by Justice Carley[19], regarding Justice Sears' disagreement with the distinction between licensing and zoning, does not change the result of this case. A detailed rationale for this distinction is set forth in Respondents' Opposition Brief to

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(Cont'd)
an adult entertainment license for the same property is a valid requirement. There is no right, contractual or otherwise, to have both an adult entertainment license and an alcohol license on the same premises. *S.J.T. Inc. v. Richmond County*, 263 Ga. 267, 430 S.E. 2d 726 (1993).

19. *See* Respondents comments in this regard on p. 2 of this Opposition Brief.

the petition of Mukesh Shretta. *See* pp. 6-12. The distinction has no relation to nor does it contradict the rejection of the "right-privilege" dichotomy by this Court. Rather, the distinction is based on the constitutional principles of this Court set forth in *Roth* that due process is not implicated where there is no vested property right. As set forth above, this determination is based on the state or local law at issue, and in this case, the law clearly establishes that Petitioners did not have a vested right to the renewal of their licenses.

Petitioners' extreme interpretation of the due process clause would require that a government grant a license to all applicants regardless of the local requirements in existence at the time a renewal application is filed simply because the government had previously granted such licenses. In other words, Petitioners urge this Court to prohibit local governments and states from ever changing their ordinances or rules once a license is issued under an initial statute or rule notwithstanding that such licenses expire every year. It is this argument that "would work radical surgery on the due process clause" and not the rationale employed by the Georgia Supreme Court in holding that a license which expires on an annual basis confers no vested right. The jurisdictions which have determined that a vested right exist in the renewal of a license are based on state statutes which provide for perpetual duration rather than an annual duration. There is a legitimate claim of entitlement to the former which does not exist with the latter.

The holding of the Georgia Supreme Court is entirely consistent with the established precedent of this Court. Furthermore, the traditional "bundles of rights" that are inherent in property ownership are not swept away by the Georgia courts but must be balanced with the right of local governments to enact ordinances pursuant to their police powers. In this case, Petitioners' 1995 licenses which were already issued at the time

the ordinance was enacted were not suspended or revoked. Petitioners simply did not meet the requirements for obtaining both an alcohol and adult entertainment license on the same property at the time of the renewal application for calendar year 1996. Petitioners were notified of the public hearing in accordance with state law[20] and allowed an opportunity to be heard prior to passage of the ordinance. It should be noted, however, that any argument regarding the sufficiency of this notice or the public hearing cannot be considered by this Court as such argument has been previously waived by these Petitioners. *See* pp. 18-20 of Respondents' Opposition Brief to the petition of Mukesh Shretta *et al.* Nothing further was required. As this Court held in *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985), "[t]he legislative determination provides all the process that is due."

Accordingly, no due process considerations have been circumvented by any party in this case. The Georgia courts applied the stringent three-prong test of *Paramount Pictures* and determined that the ordinance was constitutional. Contrary to Petitioners' assertions, the decision of the Georgia Supreme Court is not only consistent with this Court's precedent but with the holdings of other jurisdictions as well. The fact that some differences exist in the opinions of other states does not warrant review by this Court. The yardstick of *City of Renton* and the framework established in *O'Brien* and adopted by the Georgia courts in *Paramount* have proved to be adequate in protecting the due process rights of property owners such as Petitioners. The record of this case clearly reveals that the Georgia courts properly followed the guidance of this Court, and have not infringed upon any federally protected rights. Respondents certainly recognize that Petitioners are unhappy with the requirement of choosing between alcohol and adult entertainment but *Certiorari* is not warranted simply because

20. *See* O.C.G.A. § 50-14-1 — Georgia's Open Meeting Act.

Petitioners feel such choice is not economically feasible. There is no federal constitutional right to offer adult entertainment in conjunction with the sale of alcohol.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondent
City of Marietta

APPENDIX A — CODE OF ORDINANCE OF THE CITY OF MARIETTA, GEORGIA, SECTION 8-5032

COUNCIL BILL NO. 400195 ORDINANCE BILL NO. 5399

AN ORDINANCE

Findings; Public Purpose; Legal Authority. (a) Based upon the experience of other urban counties and municipalities, which experiences we believe are relevant to the problems faced by City of Marietta, Georgia, and based upon a review of a report from the Marietta City Police Department summarizing the criminal activity surrounding the three (3) existing license holders within the City of Marietta, we take note of the notorious and self-evident conditions attendant to the commercial exploitation of human sexuality, which do not vary greatly among generally comparable communities within our country. Moreover, it is the finding of the City Council of Marietta that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars" or establishments offering so-called "nude entertainment" or "adult entertainment", begets criminal behavior and tends to create undesirable community conditions. Among the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior hereinabove described, and acceleration of community blight by the concentration of such establishments in particular areas. Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and

undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity. To that end, this Ordinance is hereby adopted.

(b) This ordinance is also adopted pursuant to the authority granted by Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia.

(c) This ordinance is further adopted to protect the public safety, health and welfare.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GEORGIA, THAT:

Section 1. The Code of Marietta, Georgia, is hereby amended to add section 8-5032 which shall read as follows:

> "*8-5032*
>
> a) No person, association, partnership or corporation licensed under Chapter 5 of Part 8 (8-5001 et seq.) of the Marietta City Code after the effective date of this ordinance shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor, beer or wine or controlled substance upon the premises of any licensee. Any licensee whose license was granted prior to the adoption of this amendment shall not be subject to this amendment until December 31, 1995, at which time all licensees within the City of Marietta shall be subject to this provision,

including those licensees licensed before the effective date hereof.

b) This section (8-5032) shall not apply nor prohibit the live performance of legitimate plays, operas, ballets at mainstream theaters, concerts halls, museums or educational institutions holding a license, which derive less than twenty (20%) of its gross receipts from the sale of alcoholic beverages."

Section 2. It is hereby declared to be the intention of this Ordinance that its sections, paragraphs, sentences, clauses and phrases are severable, and if any section, paragraph, sentence, clause or phrase of this Ordinance is declared to be unconstitutional or invalid, it shall not affect any of the remaining sections, paragraphs, sentences, clauses or phrases of this Ordinance.

Section 3. All Ordinances or parts of Ordinances in conflict with this Ordinance are hereby repealed.

Section 4. This Ordinance shall become effective upon the signature or without the signature of the Mayor, subject to Georgia laws 1983, page 4119.

DATE: January 19, 1995 APPROVED:

s/ Ansley L. Meaders
ANSLEY LITTLE MEADERS, Mayor

Appendix A

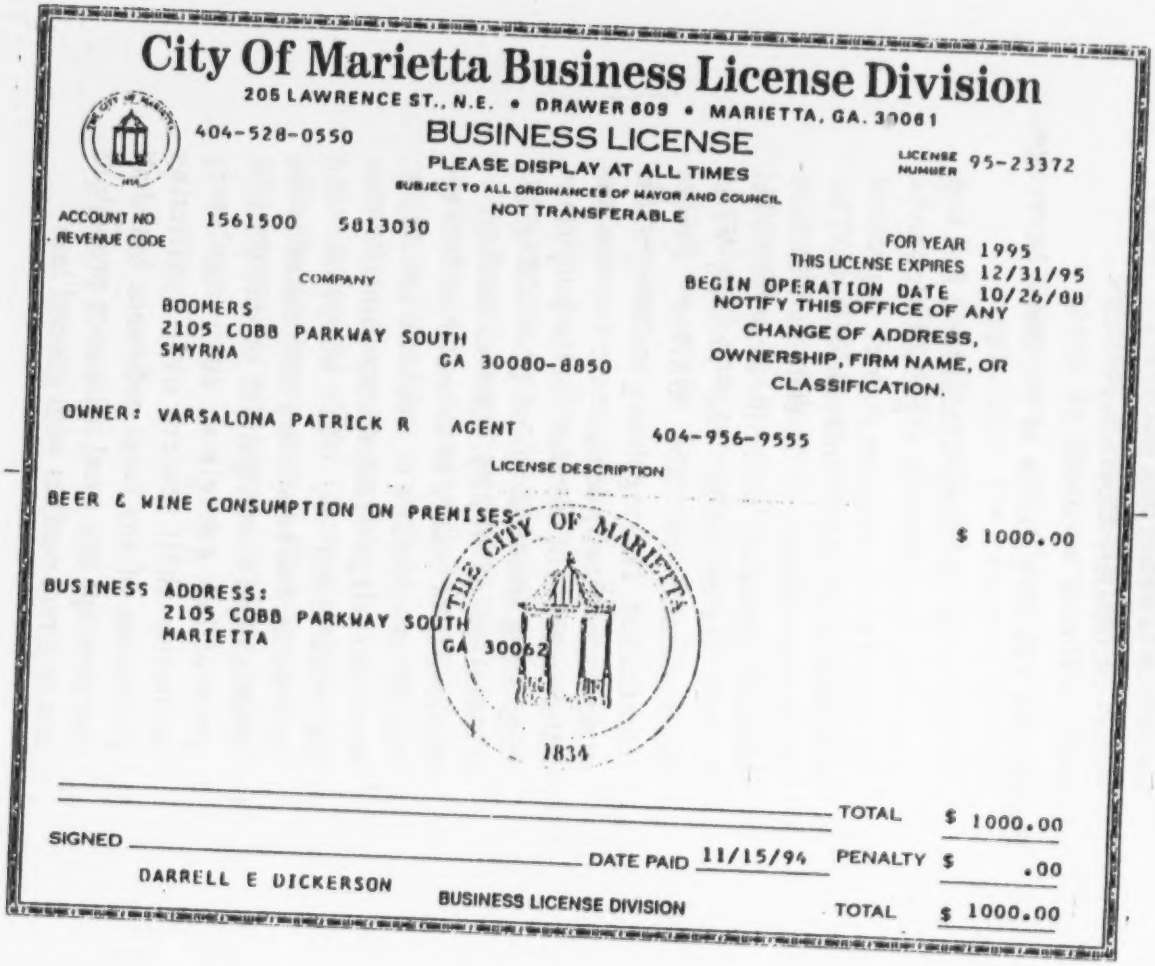
ATTEST:

s/ Sheila R. Hill
SHEILA R. HILL, City Clerk

APPROVED AS TO FORM:

s/ Douglas R. Haynie
DOUGLAS R. HAYNIE, CITY ATTORNEY

APPENDIX B — ANNUAL BUSINESS LICENSE OF VARSALONA'S ITALIAN RESTAURANT D/B/A BOOMER'S



City Of Marietta Business License Division

205 LAWRENCE ST., N.E. • DRAWER 609 • MARIETTA, GA. 30061

404-528-0550

BUSINESS LICENSE

PLEASE DISPLAY AT ALL TIMES

SUBJECT TO ALL ORDINANCES OF MAYOR AND COUNCIL

NOT TRANSFERABLE

LICENSE NUMBER 95-23372

ACCOUNT NO 1561500
REVENUE CODE 5813030

FOR YEAR 1995
THIS LICENSE EXPIRES 12/31/95
BEGIN OPERATION DATE 10/26/88

COMPANY

BOOMERS
2105 COBB PARKWAY SOUTH
SMYRNA GA 30080-8850

NOTIFY THIS OFFICE OF ANY CHANGE OF ADDRESS, OWNERSHIP, FIRM NAME, OR CLASSIFICATION.

OWNER: VARSALONA PATRICK R AGENT 404-956-9555

LICENSE DESCRIPTION

BEER & WINE CONSUMPTION ON PREMISES $ 1000.00

BUSINESS ADDRESS:
2105 COBB PARKWAY SOUTH
MARIETTA GA 30062

THE CITY OF MARIETTA 1834

TOTAL $ 1000.00

SIGNED _____ DATE PAID 11/15/94 PENALTY $ .00

DARRELL E DICKERSON
BUSINESS LICENSE DIVISION

TOTAL $ 1000.00

APPENDIX C — ARTICLE III, SECTION VI, PARAGRAPH VII OF THE CONSTITUTION OF THE STATE OF GEORGIA

GEORGIA CONSTITUTION

Paragraph VII. Regulation of alcoholic beverages.

The State of Georgia shall have full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages. This regulatory authority of the state shall include all such regulatory authority as is permitted to the states under the Twenty-First Amendment to the United States Constitution. This regulatory authority of the state is specifically delegated to counties and municipalities of the state for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages; and such delegated regulatory authority may be exercised by the adoption and enforcement of regulatory ordinances by the counties and municipalities of this state. A general law exercising such regulatory authority shall control over conflicting provisions of any local ordinance but shall not preempt any local ordinance provisions not in direct conflict with general law.

APPENDIX D — OFFICIAL CODE OF GEORGIA ANNOTATED, SECTION 3-2-7

3-2-7. Expiration and renewal of licenses generally; continuation of operations by licensee pending final approval or disapproval of application for renewal; penalty for late application for renewal; temporary permits.

(a) Except as otherwise specifically provided in this title, all licenses issued pursuant to this title shall expire on December 31 of each year and application for renewal shall be made annually on or before November 1.

(b) Any licensee making proper application, with all supporting documents, for a license to operate during the following calendar year and having filed the application prior to November 1 shall be permitted to continue to operate pending final approval or disapproval of the licensee's application for the following year if final approval or disapproval is not granted prior to January 1.

APPENDIX E — AFFIDAVIT OF COUNCILMAN FRANK T. AYERS

AFFIDAVIT OF FRANK T. AYERS

PERSONALLY before the undersigned officer, duly authorized by law to administer oaths, came Frank T. Ayers, who, after being sworn, deposes as follows:

1.

This affidavit is based upon my personal knowledge.

2.

My name is Frank T. Ayers, and I am the elected official representing Ward 6 of the City of Marietta, Georgia. I am currently the elected official for said position and was the elected official for said position on January 19, 1995.

3.

I attended the specially called meeting of the Marietta City Council on January 19, 1995, which commenced at approximately 6:00 p.m. and adjourned at approximately 10:00 p.m.

4.

At the conclusion of said meeting, I voted for the passage of Council Bill No. 400195, Ordinance Bill No. 5399, which is marked as "P-8" in my deposition.

Appendix E

5.

My vote on this Ordinance was an act carried out by me in my official capacity as the elected official for Ward 6 of the City of Marietta, Georgia and my vote was within my official duty as such elected official.

6.

My vote was taken in good faith and was not done or taken oppressively, maliciously, or corruptly. In voting on said Ordinance, it was not my intention to cause injury or damage to any specific person, firm, entity or organization; rather, it was my intention to adopt an Ordinance having general application throughout the City of Marietta.

7.

In voting on said Ordinance, I did not receive any pecuniary gain as a result of said vote, other than the normal salary set forth in the Marietta City Charter.

8.

In voting on said Ordinance, I was acting in a legislative capacity and performing a legislative function.

9.

In voting on said Ordinance, I relied upon the studies contained in the Record and contained in my deposition. I found said studies to be relevant to the City of Marietta, the problems faced by the City of Marietta and the problems addressed in the

Ordinance. I also relied upon the testimony and evidence presented at the public hearing. I also relied upon the advice of the City Attorney and the Constitutional Amendment approved by the voters of this State on November 8, 1994.

10.

My only motives for voting for said Ordinance are those stated in the preamble of said Ordinance. My personal feelings on any subject matter contained in said Ordinance did not enter into my vote.

This 5 day of December 1995.

s/ Frank T. Ayers
FRANK T. AYERS

Sworn to and Subscribed before me this
5 day of December, 1995.

s/ Shaun Renae Gee
Notary Public